

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)

Implementation of Sections of the Cable)
Television Consumer Protection and)
Competition Act of 1992: Rate Regulation)

MM Docket No. 92-266

MM Docket No. 93-215

To: The Commission

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

James Cable Partners and Rifkin and Associates, Inc., by their attorneys and pursuant to Section 1.429(f) of the Commission's Rules, hereby submit this opposition to the two Petitions for Reconsideration ("Petition" or "Petitions") in the referenced proceeding filed by the Georgia Municipal Association ("GMA") and the New Jersey Board of Public Utilities ("New Jersey Board"). The New Jersey Board and GMA both seek reconsideration of certain distinct aspects of the Commission's *Small System Order*.¹ The New Jersey Board seeks reconsideration of narrow issue of the application of the *Small System Order* to cases pending before local franchising authorities. GMA takes issue with the method by which the Commission arrived at the presumed reasonable rate of \$1.24 per channel. For the reasons set forth below, the Petitions for Reconsideration should be rejected.

¹ See *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, FCC 95-196 (released June 5, 1995).

1. **Different Regulatory Treatment of Small Systems Is Appropriate and In the Public Interest.**

One of the Commission's statutory obligations is to reduce regulatory burdens and the cost of compliance for small systems.² In compliance with that obligation, the Commission, based on extensive evidence, revised its rate regulatory scheme as applied to certain small cable companies.³ Specifically, after evaluating most of the country's 11,200 cable systems and 1,500 cable companies, the FCC concluded that systems with fewer than 15,000 subscribers differ from systems with more than 15,000 subscribers with respect to the following characteristics:⁴

- * the average monthly regulated revenue per channel per subscriber for systems with fewer than 15,000 subscribers is almost twice that of systems with more than 15,000 subscribers.
- * the average number of subscribers per mile for systems with fewer than 15,000 subscribers is almost **half** that of systems with more than 15,000 subscribers.
- * the average annual premium revenue per subscriber for systems with fewer than 15,000 subscribers is \$41.00, compared to \$73.13 for systems with more than 15,000 subscribers.⁵

In other words, small systems incur substantially greater per-subscriber costs for cable distribution plant, and at the same time have substantially lower revenues from premium services to defray those costs. These less favorable economic characteristics of

² See The Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §§534, 543(i)

³ See *Small System Order*.

⁴ *Id.* at ¶75; *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119, 4173 & n. 157 (1994).

⁵ *Id.* at ¶27.

small systems were the Commission's primary reason for granting regulatory relief to small cable systems. Specifically, in light of these objective characteristics, the Commission found that systems with fewer than 15,000 subscribers may establish rates on the basis of a simplified cost-of-service calculation. A per-channel rate that does not exceed \$ 1.24 per month will be presumed reasonable.⁶

2. The New Jersey Board Petition is Internally Inconsistent

The New Jersey Board does not dispute the underlying policies that justify special regulatory treatment for small systems or the presumed reasonable rate of \$1.24 as articulated in the *Small System Order*. Rather, the New Jersey Board requests that the Commission reconsider ¶ 74 of the *Small System Order*, which directs "franchising authorities to permit [eligible] systems to use the small system cost-of-service approach to justify rates in any proceeding that is pending as of the date this item is released . . ."⁷

The New Jersey Board's request that eligible operators not be permitted to utilize the procedures set forth in the *Small System Order* in pending cases cannot logically be reconciled with its acceptance of the policies underlying the necessity for such procedures. Once the Commission has concluded that there is a need for special regulatory treatment and established a presumed reasonable rate per channel, it would be punitive, as well as administratively wasteful, to complete pending cases under pre-existing criteria that do not

⁶ *Id.* at ¶ 54.

⁷ *Id.* at ¶ 74.

embody the policy and statutory concerns that led to the adoption of the *Small System Order* in the first place.

Furthermore, if the rules contained in the *Small System Order* were applied only to newly filed cases, this would tend to subject customers of small systems to rate spikes. In other words, if eligible small systems are not permitted to justify rates in pending cases on the basis of the new procedures that have been found to be necessary and reasonable, such systems would have an incentive to file for rate increases under the new rules at the earliest possible opportunity. Customers would experience rate decreases or even refunds under the old rules, followed promptly by presumptively reasonable rate increases under the new rules. This is a totally unjustified result when, on the merits, the Commission has already determined that the new rate would have been reasonable from the outset.

Finally, the New Jersey Board states that because of the limits on its ability to seek discovery when rates calculated pursuant to the *Small System Order* are below \$ 1.24, such calculated rates "[w]ill be difficult if not impossible to challenge." The New Jersey Board's concerns are unfounded. If a local franchising authority is close to issuing a rate order or reaching a settlement in a pending case, as the New Jersey Board describes in its filing, then it has presumably already conducted all of the discovery necessary to "challenge" rates calculated pursuant to the procedures outlined in the *Small System Order*. If such discovery has not been undertaken, the streamlined procedures, specifically designed to minimize burdens upon the franchising authorities as well as cable operators, will simplify the process of review.

3. GMA's Petition is Without Merit

Like the New Jersey Board, GMA does not challenge the finding or the underlying policy in the *Small System Order* that the unique characteristics of small systems necessitate special regulatory rules. GMA seeks reconsideration of the *Small System Order* because it believes the Commission's method of arriving at the presumed reasonable rate of \$ 1.24 is flawed. GMA's petition is without merit.

The presumed reasonable rate of \$ 1.24 is based on 35 Form 1220 cost of service filings filed by small operators as defined by the *Small System Order*. The Commission determined that the subscriber weighted average cost per channel for such systems was \$.93. To that average, the Commission added one standard deviation to arrive at the \$ 1.24 figure.

GMA states that the FCC's methodology incorrectly assumed that the rates shown on the Form 1220s were justified. In support of this assertion, GMA states that "several of the Form 1220s submitted by cable operators in Georgia include a high value of intangible assets in the rate base, despite the fact that the FCC presumes such costs to be excluded." However, the Commission specifically addressed this issue in the *Small System Order*.

The presumptions and restrictions applicable to standard cost-of-service proceedings shall not apply. Thus, for example, we will not presume it unreasonable to include in the rate base start-up losses that exceed the first two years of operating expenses. Having isolated a category of systems for whom our standard rules need to be relaxed due to the particular characteristics of those systems, we seek to ensure that those systems will be permitted to establish rates in accordance with such characteristics, rather than in accordance with characteristics of cable systems generally.

Likewise, we will not presumptively exclude intangibles such as acquisition costs from the net rate base.⁸

GMA also argues that in each of nine cost of service orders, the Commission has issued, the Commission has found "that the cable operator included rate base and expense items which it should not have included." But the fact that the Commission may have quibbled with some of the details of certain operators' filings under "general cost-of-service principles" is not germane to the analysis underlying the *Small System Order*, which was based on *Form 1220* information. The uniformity of presentation in the *Form 1220* provides a basis for the Commission to be more confident in those data.

4. Conclusion

The Commission has repeatedly recognized that small systems owned by small cable companies require reduced regulatory burdens to remain economically viable under re-regulation of the cable industry.⁹ Such relief is necessary for small cable companies "to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition."¹⁰ By relaxing regulatory burdens, the rate relief contained in the *Small System Order* will enhance small systems' ability to attract capital, thus enabling them to grow and prepare for competition.¹¹ The public interest will not be served by

⁸ *Small System Order* at ¶¶ 59-60 (footnotes omitted).

⁹ See, e.g., *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5921 (1993); *Order*, MM Docket No. 92-266, FCC 93-372 (released July 27, 1993), 58 Fed. Reg. 41042 (August 2, 1993) (Statement of Commissioner Andrew C. Barrett); *Second Recon. Order*, 9 FCC Rcd at 4172-83, 4218-33.

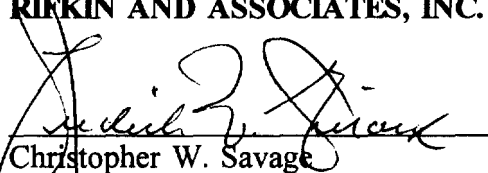
¹⁰ *Small System Order* at ¶25.

¹¹ *Id.* at ¶26.

preventing small systems from utilizing the procedures set forth in the *Small System Order* in pending cases or by determining the presumptively reasonable rates in accordance with the characteristics of cable systems generally, rather than on the particular characteristics of small systems. Accordingly, GMA's and the New Jersey Board's Petitions for Reconsideration should be denied.

Respectfully submitted,
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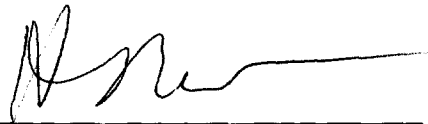
September 27, 1995

CERTIFICATE OF SERVICE

I, Heather Roberts, hereby certify that I have this 27th day of September, 1995,
caused a copy of the foregoing to be delivered by first class mail, postage pre-paid to the
following:

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A handwritten signature in black ink, appearing to read 'H Roberts', written over a horizontal line.

Heather Roberts